



1979

The Adoption Trilemma: The Adult Adoptee's Emerging Search for His Ancestral Identity

Marshall A. Levin

Former Judge, Baltimore City Circuit Court

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/ublr>



Part of the [Law Commons](#)

Recommended Citation

Levin, Marshall A. (1979) "The Adoption Trilemma: The Adult Adoptee's Emerging Search for His Ancestral Identity," *University of Baltimore Law Review*: Vol. 8: Iss. 3, Article 4.

Available at: <http://scholarworks.law.ubalt.edu/ublr/vol8/iss3/4>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Review by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

THE ADOPTION TRILEMMA: THE ADULT ADOPTEE'S EMERGING SEARCH FOR HIS ANCESTRAL IDENTITY

Marshall A. Levin†

In 1974, while presiding over Circuit Court Number 2 of Baltimore City, a court having jurisdiction over domestic relations cases, the author was struck by the searing emotionalism often arising when adoptees' quests to learn about their genealogical heritage were frustrated by Maryland's "sealed record" rule, which denies adoptees access to the records of their adoption proceedings except upon an order of court (which, in effect, means a showing of "good cause"). In this Article, the author critically examines such rules (and similar statutes) in light of the interests of the parties to the adoption process. He recommends that these restrictive rules and statutes be modified to grant access to adoptees when they reach the age of majority.

I. INTRODUCTION

The adoption process does not trace its roots to the English common law,¹ but rather to statutory creation by the state.² Despite this absence of a venerable Anglo-Saxon legal heritage, the separation of child from birthparent³ is a theme frequently woven into literature,⁴ religion,⁵ and folklore.⁶ Adoption's attraction to

† B.A., 1941, University of Virginia; J.D., 1947, Harvard Law School; Associate Judge, Supreme Bench of Baltimore City (8th Judicial Circuit).

The author gratefully acknowledges the assistance of Paul S. Teitelbaum, staff member, *University of Baltimore Law Review*.

1. Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 746 (1956). The English would not accept the fiction that bloodlines could be created by legal process. "Now it is plain that as soon as we admit the doctrine of artificial kindred — that is as soon as we allow the exercise of the law of adoption — physical purity of race is at an end." Freeman, *Race and Language* in 28 HARVARD CLASSICS 247 (1910).
2. MD. ANN. CODE art. 16, § 67 (1973).
3. The matter of nomenclature is of significance. "Birthparents" have been variously called "biological parents" or "natural parents." When one uses "biological parents" a question is raised as to whether adoptees are made of plastic. When one says "natural parents" there is an implication that adoptees are unnatural. See M. BENET, *THE POLITICS OF ADOPTION* 9 (1976).
4. The Shakespearean adoptive mother put it poignantly:
 I say, I am your mother;
 And put you in the catalogue of those
 That are enwombed mine; tis often seen
 Adoption strives with nature and choice breeds
 A native slip to us from foreign seeds;
 You ne'er oppressed me with a mother's groan,
 Yet I express to you a mother's care.
5. The Countess of Rousillon, *ALL'S WELL THAT ENDS WELL*, I, iii, 150-56.
6. Moses, hidden on the edge of a river by his mother in order to escape death at the hands of the Pharaoh's soldiers, was found and adopted by one of the Pharaoh's daughters and was raised as an Egyptian. *Exodus* 2:1-11.
6. There is a legend that Romulus and Remus, storied founders of Rome, were abandoned soon after birth and raised by a she-wolf. T. FRANK, *A HISTORY OF ROME*, 21-22 (1925).

those who chronicle the human condition lies in the often poignant and growing interaction it engenders among the parties involved — birthparents, adoptive parents, and adoptee. Guided in part by a desire to avoid possible disruptive interchanges among these parties, most American jurisdictions have enacted “sealed records” statutes and rules⁷ prohibiting the disclosure of the identity of the adoptee’s birthparents except upon the showing of “good cause.”⁸ Increasingly, however, such prohibitions have come under criticism from sociologists, psychiatrists and physicians⁹ as not promoting the welfare of the adoptee, as well as from members of the legal profession who question their constitutionality.¹⁰ Additionally, adoptees, who are becoming more vocal in asserting their “right to know,” have joined together in groups to promote their common interest in abolishing sealed record statutes.¹¹ In growing numbers, courts throughout the country have fashioned practical remedies in response to proliferating litigation.

The tripartite nature of the adoption process is delineated in Article 16, Section 67(a) of the Maryland Annotated Code. It states, in pertinent part, that,

The General Assembly hereby declares its conviction that the policies and procedures for adoption are socially necessary and desirable, having as their purpose the threefold protection of (1) the adoptive child, from unnecessary separation from his natural parents and from adoption by persons unfit to have such responsibility; and (2) the natural parents, from hurried and abrupt decisions to give up the child; and (3) the adopting parents, by providing them information about the child and his background, and

7. State sealed record statutes are collected in Note, *The Adoptee's Right to Know His Natural Heritage*, 19 N.Y.L.F. 137, 137-38 n.5 (1973). State statutes allowing more liberal access to documents containing the identity of an adoptee's birthparents are collected in *Sealed Records In Adoptions: The Need for Legislative Reform*, 21 CATH. LAW. 211, 213-14 nn. 17-22 (1975). Other nations have liberal access provisions. See, e.g., Children's Act, 1975, c. 72, § 26 (allowing English and Welsh adoptees upon reaching the age of eighteen to apply to the Registrar-General in order to obtain a certified copy of their record of birth); Adoption of Children Act 1930, 20 and 21 Geo. 5, c. 37, § 11 (permitting Scottish adoptees to obtain a copy of the original entry relating to their birth upon reaching the age of seventeen); Adoption of Children Law of 1960, 14 Laws of Israel 93, No. 45 (permitting open inspection of adoption records after an adoptee has reached the age of eighteen).

8. See, e.g., *In re Wells*, 281 F.2d 68 (D.C. Cir. 1960); *In re Minicozzi*, 51 Misc. 2d 595, 273 N.Y.S.2d 632 (Sup. Ct. Suffolk Co. 1966).

9. See text accompanying notes 17-38 *infra*.

10. See text accompanying notes 56-104 *infra*.

11. The leading group is Adoptees' Liberty Movement Association (ALMA) in New York. It was founded by Florence Fisher, a crusading adoptee and author of *THE SEARCH FOR ANNA FISHER* (1973). Adoptees in Search (AIS), another organization primarily devoted to the “search,” is located in Bethesda, Maryland.

protecting them from subsequent disturbance of their relationships with the child by natural parents.¹²

The legislative interest in severing cleanly the ties between birthparents and their children and in vesting adoptive parents with the full range of rights and obligations that exist in the parent-child relationship is evidenced in Article 16, Section 78:

From and after the entry of . . . a final decree of adoption . . . , the following legal effects shall result:

(a) . . . the person adopted shall be, to all intents and purposes, the child of the petitioner . . . and . . . the person adopted shall be entitled to all the rights and privileges and subject to all the obligations of a child born in lawful wedlock. . . .

(b) The natural parents of the person adopted, if living, shall, after the interlocutory decree, *be relieved of all legal duties and obligations* due from them to the person adopted, and shall be *divested of all rights* with respect to such person. . . .¹³

Rule D81(a) of the Maryland Rules seeks to effectuate the intent of Section 68 by sealing the record of adoption proceedings except on order of the court.¹⁴ Thus Maryland law deprives the adoptee of knowledge of the identity of his biological heritage, unless he¹⁵ can persuade a court to order the release of his adoption records.

This Article will explore the question of whether such a policy is consonant with the view that the adult adoptee's welfare is of paramount importance.¹⁶ Additionally, it will discuss the judicial treatment accorded charges that "sealed record" statutes are unconstitutional. Finally examined will be the nature of the showing an adult adoptee must make in order to persuade a court to grant him access to the record of the adoption proceedings containing the identity of his birthparents.

II. THE TRIALS OF PARTIES INVOLVED IN ADOPTION AND THEIR CONFLICTING INTERESTS

A. *The Adoptee's Interest in Determining His Biological Origin*

The wellspring of the attack on sealed record statutes lies in the growing recognition of psychological impairment occasioned by the

12. MD. ANN. CODE art. 16, § 67(a) (1973).

13. *Id.* at § 78 (emphasis supplied).

14. *Id.*

15. Searching adoptees are "almost universally female. Perhaps men think it weak and unmanly to look for an unknown mother, but . . . women, as bearers of the next generation of children, are more intimately touched by pregnancy and birth than men. They more easily identify and want contact with the mothers who bore them." L. BURGESS, *THE ART OF ADOPTION*, 148 (1976).

16. *Cecil Co. Dep't of Social Servs. v. Goodyear*, 263 Md. 611, 284 A.2d 426 (1971).

denial of access to information regarding birth origin.¹⁷ By negative implication Dr. James A. Gibb, Director of Child and Adolescent Psychiatry at the Sheppard and Enoch Pratt Hospital in Maryland, states the case against legislatively-mandated denial of access: "The adult adoptee should have the right to know his biological origin . . . in terms of mental health it would be a step in the right direction."¹⁸

A statement by the Committee on Adoption of the American Academy of Pediatrics¹⁹ enumerated several respects in which adopted children encounter more difficulty than children raised by their birthparents. These include a larger measure of emotional stress and difficulty in establishing a sense of identity.²⁰ The Committee recommended that adoptive parents take the initiative and discuss his ancestry with the child.²¹ A 1974 report to the National Commission and Adoption and Dependent Care of the American Academy of Pediatrics²² noted seven problems found to be prevalent in the adoption process.²³ Five of the seven pertained

17. R. ISAAC, *ADOPTING A CHILD TODAY* 179 (1965); H. KIRK, *SHARED FATE* (1961); M. KORNITZER, *ADOPTION AND FAMILY LIFE* (1968); A. MCWHINNIE, *ADOPTED CHILDREN — HOW THEY GROW UP* (1967); R. MAY, *MAN'S SEARCH FOR HIMSELF* 92 (1967); J. TRISELIOTIS, *IN SEARCH OF ORIGINS, THE EXPERIENCES OF ADOPTED PEOPLE* 165 (1973); Cominos, *Minimizing the Risks of Adoption Through Knowledge*, 16 *SOCIAL WORK* 73 (1971); Crown, *Ingredients of a Therapeutic Family in a Browndale Motel*, *INVOLVEMENTS* 3, 4 (March - April 1974); Elone and Schwartz, *A Longitudinal Study of Emotional, Social and Academic Functioning of Adopted Children*, 48 *CHILD WELFARE* 72, 74-78 (1969); Jones, *The Sealed Adoption Record Controversy*; Report of a Survey of Agency Policy, Practice and Opinion 20 (1976); Katz, *Community Decision-Makers and the Promotion of Values in the Adoption of Children*, 4 *J. FAM. L.* 7 (1964); Kiester, *Should We Unlock the Adoption Files?* 52 *TODAY'S HEALTH* 54 (1974); Kilbanoff, *Genealogical Information in Adoption*, 11 *FAM. L. Q.* 185, 195 (1977); Lilliston, *Social Workers Discuss Adoptees Plight*, *L.A. Times*, Apr. 15, 1974, § 4, at 12, col. 1, at 13, col. 1; Simon & Santuria, *Adoption and Psychiatric Illness*, 122 *AM. J. OF PSYCH.* 858, 864 (1966); Sorosky, Baran & Pannor, *The Effects of the Sealed Record in Adoption*, 133 *J. OF PSYCH.* 900 (1976); Wellisch, *Children with Genealogy — A Problem of Adoption*, 13 *MENTAL HEALTH* 41 (1952); Note, *Natural v. Adoptive Parents: Divided Children and the Wisdom of Solomon*, 57 *IOWA L. REV.* 171, 184 n.72 (1971) (may lead to lack of self-identity); address by Florence Fisher, Third North American Conference on Adoptable Children (Apr. 20, 1972) (denial of information may result in severe learning difficulties); W. Reynolds, Eisnetz, Chiappise and Walsh, *Personality Factors Differentiating Searching and Un-Searching Adoptees*, a paper presented to the Amer. Psych. Ass'n (Sept. 1976).

18. Letter to author from Dr. Gibbs dated July 28, 1978.

19. *Identity Development In Adopted Children*, 47 *PEDIATRICS* 948 (1971).

20. *Id.*

21. *Id.* at 949.

22. J. Davis, Report to the National Committee on Adoption and Dependent Care, American Academy of Pediatrics, Henry Siedel, M.D. Chairman. Presented Oct. 23, 1974.

23. 1. Infants are given up for adoption by their mothers often under conditions of great emotional stress.
2. Adoptees, as they grow up, have a compelling need to learn about their natural identity irrespective of their feelings for, or their relationship with, their adoptive parents.
3. Natural parents may never be able to resolve their feelings about the child they relinquished for adoption.

directly to the adoptee's unrequited need for origin information. Of the five recommendations made in the report, four involved according adoptees more liberal access to such information.²⁴ The physician presenting the report stated,

The more I go into the subject, the more I realize that one cannot erase biological heritage by a court decree and that unless we are going to create two classes of citizens, the adoptee has as much right to learn his true identity as does the naturally born child.²⁵

He favored providing adoptees with origin information when they reach majority.²⁶

An influential Scottish study²⁷ noted that a life crisis, such as death of one or both adoptive parents, illness, separation, or divorce frequently triggers the adoptee's quest for knowledge of the identity of his birthparents.²⁸ The study observed that in regard to origin inquiry, adoptees fall into two groups — one whose members seek to meet their birthparents, and the other composed of persons who, while desiring information regarding their ancestry, harbor no interest in actually meeting their birthparents or in developing a

-
4. Adoptive parents sometimes feel threatened or hurt when their adoptive child pressed the search for his or her natural identity even though all parents, be they natural or adoptive, do not "own" their children, but rather have the role of guiding them into maturity and independent citizenship.
 5. Adoptees are made to feel inferior — like second-class citizens — when they are denied access to their birth records.
 6. The non-disclosure regulations deprive the adoptees of a natural right as persons through a covenant made at a time when it was impossible for them to give their own consent.
 7. Social agencies and courts may be unduly restrictive and arbitrary in rejecting adoptees' petitions for information.

Id. at 3-4.

24.
 1. Support present efforts of [adult] adoptees . . . to gain access to court and agency records to learn their identity.
 2. Inform adoption and social agencies and the courts that . . . present policies are unfair and unduly restrictive to the adoptee and should be modified.
 3. Advocate for a change in adoption laws to legalize opening of records when the adoptee reaches maturity.
 4. Support efforts of [birthparents] desiring to locate their children after they have reached maturity.
 5. Work with adoptive parents to provide a better understanding of their role and allow them to accept that the identity search should in no way reflect upon their role or relationship with their adopted child.

Id. at 4.

25. *Id.* at 10.

26. *Id.* at 7.

27. J. TRISELIOTIS, IN SEARCH OF ORIGINS, THE EXPERIENCES OF ADOPTED PEOPLE (1973).

28. *Id.* at 96.

relationship with them.²⁹ The study revealed that the former group displayed a number of negative characteristics, including a history of an unhappy home life and a low measure of self-esteem.³⁰ Members of this group generally were less satisfied with the outcome of their search.³¹ In contrast, those who merely sought information regarding their ancestry were more frequently satisfied with the outcome of their search.³² Significantly, a fair amount of background information had already been made available to these people, while such information had been withheld or given only in a hostile way to members of the less-satisfied group.³³ The study concluded that detailed information regarding ancestry should be made available to adoptees.³⁴ Other important works demonstrate that diminution of genealogical bewilderment³⁵ — and enhancement of genetic ego³⁶ — are legitimate human imperatives. Revelation of adoption can be a transcendental trauma to an adoptee, and in growing numbers, adoptees are determined to know their heritage. The need is in their bone and marrow. As put by Erik Erikson, "these psychosocial and psychohistorical dimensions reach right down into intraphysic experience."³⁷

Finally, in addition to the prophylactic function with regard to emotional disturbances that disclosure of origin information may serve, it has been noted that such information should be made available in order to determine if the adoptee's biological family has a history of hereditary ailments to which the adoptee may be peculiarly susceptible.³⁸

B. The Interests of Birthparents and Adoptive Parents

There is thus an increasing body of evidence that sealed record statutes work at cross-purposes to the best interests of adoptees. An assessment of the desirability vel non of such laws, however, may not be made without considering the often competing interest in the laws' continued existence possessed by the other parties to the adoption triangle — the birthparents and the adoptive parents.

29. *Id.* at 118.

30. *Id.* at 108.

31. *Id.* at 141.

32. *Id.* at 139.

33. *Id.* at 160.

34. *Id.* at 166.

35. See Sants, *Genealogical Bewilderment in Children with Substitute Parents*, 37 BRIT. J. OF MED. PSYCH. 133 (1964).

36. Cominos, *Minimizing the Risks of Adoption Through Knowledge*, 16 SOCIAL WORK 73 (1971).

37. Quoted in, M. BENET, *THE POLITICS OF ADOPTION*, 3 (1976).

38. In the absence of knowledge of pathology among an adoptee's ancestors, severe medical disorders can develop or go unnoticed for years. Of 1, 545 genetic diseases, 692 have been shown to be hereditary. Basic medical information received by the adoptive parents would promote early detection of diseases such as cystic fibrosis, diabetes, epilepsy, glaucoma and muscular dystrophy. Also, mental disorders such as schizophrenia, manic depressive psychosis and

1. Birthparents

Once possessed of the names of his birthparents, the adoptee in many instances is able to locate them.³⁹ Most adoptees are born out of wedlock.⁴⁰ While society is becoming more tolerant of illegitimacy, the birthparent may yet want to veil the birth in secrecy — a desire that is facilitated by sealed record statutes. The sudden re-entry of an adult child into such parents' lives could be traumatic. The traditional view is that birthparents place the child for adoption with an expectation of anonymity. Such an expectation would be frustrated were ready access to their identity made available. Subjecting birthparents who desire anonymity to upsetting and undesired reunion, is, by itself, a consequence to be avoided if possible. Additionally, however, the prospect of such joyless reunions may have a further ramification. Courts have stressed the state's interest in promoting the adoption process.⁴¹ Abrogation of the statutes, thereby divesting birthparents of a statutory guarantee of anonymity, is a change that is said to portend wholesale abandonment of the adoption process, with a corresponding rise in black market adoption operations.⁴²

The force of the arguments stated in favor of perpetuating sealed record statutes in order to serve the interest of the birthparents and promote the institution of adoption is vitiated by the fact that in a significant number of cases birthparents are not averse to a reunion with their children. Studies show that many birthmothers desire to share with their children current information about themselves and to receive reports concerning the welfare of their children,⁴³ and that two out of three said that if their natural children were searching for them they would desire a reunion.⁴⁴ One author observes,

sociopathy, while not strictly hereditary, do seem to "travel in families." Thus a medical history of the adoptee's biological parents would help in early detection of any of these problems. Cominos, *Minimizing the Risks of Adoption Through Knowledge*, 16 *SOCIAL WORK* 73 (1971).

39. Joanne Small, M.S.W., Board Member of Adoptees In Search, Bethesda, Maryland and member of the Department of Health, Education and Welfare's Model Adoption Legislation and Procedures Advisory Panel states that over 97% of the adoptees who participate in A.I.S. Workshops are able to find their birthparents.
40. One statistical study published in 1968 found that approximately 63% of children eligible for adoption were illegitimate. Department of Health, Education and Welfare, *Child Welfare Statistics and Supplement for the National Center for Social Statistics and Rehabilitation Service* (1968).
41. It has been held that there is "a valid state interest to balance conflicting rights of privacy and to protect the integrity of the adoption process which is likely to suffer if the assurances of secrecy are not present." *ALMA Soc'y, Inc. v. Mellon*, 459 F. Supp. 912, 917 (S.D.N.Y. 1978).
42. Note, *Adoptee's Right to Know His Natural Heritage*, 19 *N.Y.L.F.* 137, 149-50 (1973).
43. Pannor, Sorosky & Baran, *Opening the Sealed Record in Adoption — The Human Need for Continuity*, 51 *J. JEWISH COMMUNAL SERVICE* 188 (1974).
44. Comment, *Discovery Rights of the Adoptee — Privacy Rights of the Natural Parent: A Constitutional Dilemma*; 4 *U. SAN FERN. V. L. REV.* 65, 76-77 (1975).

Adoptees are particularly sensitive to the feeling their birthparents may have about being found. They respect a mother's wish to keep the past transgression a secret. They are not looking for further rejection. They are cautious in their approach and avoid disclosing their relationship to members of their mother's current families.⁴⁵

Moreover, as professionals in the social work field have observed, social work agencies perceive that even birthmothers who relinquish their children for adoption have evidenced a changed attitude towards privacy. Many times these mothers voice no objection when informed by adoption caseworkers that there may be a desire for reunion by their children when they become adults. In fact, some ask the caseworker to put their photographs in the file; some write letters to their children and ask that the letters be placed in the file to be read upon the request of the children when they become adults. Baltimore's Department of Social Services (which has established a "Single Parent's Service") now has a policy whereby relinquishing mothers are informed of the possibility of later search. This policy is increasingly becoming a standard procedure in social agencies throughout the United States.⁴⁶

Additionally, in those cases involving involuntary termination of the birthparents' parental rights, the presumption that the birthparents would desire anonymity is not so readily drawn.⁴⁷ Advocates of free access hold that concerns about a black market in babies are merely speculative.⁴⁸ This assertion is borne out by statistics tending to show that adoption has not declined in those states and countries where sealed record statutes do not exist, except perhaps to the extent that adoption everywhere has diminished with the advent of the legality of abortion and changed community views about single parentage.⁴⁹ It has also been suggested that birthparents, in the absence of sealed record statutes, will have yet another

45. L. BURGESS, *THE ART OF ADOPTION* 150 (1976). Ms. Burgess is a professional with twenty-three years of experience in social work, nineteen of them in the field of adoption.

46. Personal communication from Judith A. Eveland, Program Chief of Adoption Services, Dept. of Social Services of Baltimore City.

47. I am indebted to the authors of the Appellate Brief filed on appeal from *ALMA Soc'y, Inc. v. Mellon*, 459 F. Supp. 912 (S.D.N.Y. 1978), Professor Cyril C. Means, Jr. of the New York University Law School and Bertram E. Hirsch, Esq., for these insights, as well as for their observation that the rationale does not apply to adoption of children from ethnocultural groups (such as American Indian tribes) the tenets of whose culture and family organization are opposed to such concepts as termination of parental rights and sealed records.

48. Plaintiffs' Memorandum of Law In Opposition to Defendants' Motions to Dismiss at 117, *ALMA Soc'y v. Mellon*, 459 F. Supp. 912 (S.D.N.Y. 1978).

49. Note, *The Adult Adoptee's Constitutional Right to Know His Origins*, 48 S. CAL. L. REV. 1196, 1213-14 (1975).

legal remedy in the form of traditional tort law, should they suffer from the importunities of over intrusive offspring.⁵⁰

2. Adoptive Parents

Adoptive parents, as well as birthparents, have an interest in perpetuating sealed record statutes at least during the minority of the adopted child. A 1975 study⁵¹ concluded that adoptive parents fear that a liberalization of adoption laws, tending to promote interaction between adoptees and birthparents, would result in the alienation of the affections of the adoptee.⁵² The study suggested, however, that this anxiety represented a resurgence of feelings of emptiness and the sense of inadequacy associated with infertility.⁵³ The concern of the adoptive parents is minimized by the finding that most adoptees experienced a deeper sense of love and appreciation for their adoptive parents as a result of the establishment of a relationship with their genealogical forebears.⁵⁴ In fact, an enlightened and cooperative attitude on the part of adoptive parents in assisting the adoptee to locate birthparents demonstrates confidence and serves further to cement the adoptive parent-adoptee relationship, rather than to endanger it. It seems reasonable to believe, furthermore, that as the bond between adoptee and his adoptive parents is fused by the passage of time, the likelihood diminishes that the birthparents will pose a disruptive threat should the adoptee be granted access to the records upon reaching majority.⁵⁵

III. THE ALLEGED CONSTITUTIONAL INFIRMITIES OF SEALED RECORD STATUTES

A. First Amendment Considerations

Sealed record statutes have been attacked on a variety of constitutional grounds, but thus far the courts have rebuffed each challenge.⁵⁶ One constitutional infirmity alleged by adoptees seeking to overturn the statutes is predicated upon the first amendment, which has been held to protect the right to receive information,⁵⁷ as

50. *Id.* at 1217. Compare Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960); W. PROSSER, *THE LAW OF TORTS* § 117 (4th ed. 1971) with Bloustein, *Privacy as an Aspect of Human Dignity, an Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962 (1964).

51. Sorosky, Baran & Pannor, *The Effects of the Sealed Record in Adoption*, 133 AM. J. OF PSYCH. 900 (1976).

52. *Id.* at 901.

53. *Id.*

54. *Id.* at 902.

55. J. GOLDSTEIN, A. FREUD AND A. SOLNIT, *BEYOND THE BEST INTEREST OF THE CHILD*, 17-20 (1973).

56. See text accompanying notes 104-130 *infra*.

57. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Martin v. City of Struthers*, 319 U.S. 141 (1943).

well as the right to convey it. Sealed record statutes, it is maintained, abridge this first amendment right to receive information. One commentator asserts that access to information is necessary in order to ensure that the individual is able to participate intelligently in social decision-making processes.⁵⁸ A more expansive reading of the first amendment's protection of the right to receive information views that guarantee as designed to promote, as well, the purely personal development of the individual, divorced entirely from his role in society.⁵⁹ Whether the right to receive information is viewed as intended to promote the welfare of the adoptee as a discrete individual or the welfare of society as a whole, adoptees claim their right to develop to their full potential, which requires access to information regarding birth origin, is "intrinsically fundamental."⁶⁰ The nub of their first amendment claim lies in the close interrelationship between access to information and the development of a sense of identity.⁶¹ This asserted interrelationship is expanded by formulating another constitutional argument — that the statutes infringe upon the adoptee's right to privacy.

The right of privacy, not expressly articulated in the Constitution, but held to flow from the penumbra of certain of the amendments constituting the Bill of Rights,⁶² has been recognized frequently by the Supreme Court.⁶³ At first blush, it seems anomalous to attack sealed record statutes as impermissibly infringing upon the right of privacy, because their ostensible intent is to insulate each of the parties from the unseemly importunities of the others.⁶⁴ It is the case, however, that this penumbral right is employed by opponents as well as proponents (such as birthparents) of sealed record statutes in the following fashion. Access to information is asserted to play a crucial role in personal development.⁶⁵ Few would not concede that, in turn, one's stage of personal

58. Note, *The Adult Adoptee's Constitutional Right to Know His Origins*, 48 S. CAL. L. REV. 1196, 1204 (1975).

59. *Stanley v. Georgia*, 394 U.S. 557 (1969).

60. Plaintiffs' Memorandum of Law In Opposition to Defendants' Motions to Dismiss at 91, *ALMA Soc'y, Inc. v. Mellon*, 459 F. Supp. 912 (S.D.N.Y. 1978).

61. Note, *The Adult Adoptee's Constitutional Right to Know His Origins*, 48 S. CAL. L. REV. 1196, 1205 (1975).

62. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 893 (1978) (citing *Whalen v. Roe*, 429 U.S. 589, 598 n.23 (1977)).

63. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (single person's privacy right includes decision whether to use contraceptives); *Stanley v. Georgia*, 394 U.S. 557 (1969) (first amendment protects private possession of obscene materials; *Terry v. Ohio*, 392 U.S. 1 (1968); *Katz v. United States*, 389 U.S. 347 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (state law prohibiting use of contraceptives held invalid intrusion on marital privacy); *Boyd v. United States*, 116 U.S. 616 (1886) (privacy right is reflected in the fourth and fifth amendments' protection against illegal search and seizure).

64. Note, *The Adult Adoptee's Constitutional Right to Know His Origins*, 48 S. CAL. L. REV. 1196, 1200 (1975) (citing *Terzian v. Superior Court*, 10 Cal. App. 3d 286, 294-95, 88 Cal. Rptr. 806, 813 (1970)).

65. *Id.* at 1205.

development necessarily plays a role in decision-making.⁶⁶ The Supreme Court has held that the right to privacy proscribes governmental intrusion into an individual's decisions regarding fundamental issues.⁶⁷ Thus, the right to privacy, defined in this instance as the absence of governmental intrusion into fundamental decision making, is infringed by statutes that deny access to information pertinent to identity development and, consequently, to fundamental decision-making. The rationale of *Griswold v. Connecticut*⁶⁸ is apposite, because in that case it was held that a state cannot constitutionally ban dissemination of information regarding the use of contraceptives because such a ban would restrict the flow of information upon which married couples base fundamental decisions.

Alternatively stated, the nexus between sealed record statutes and the right to privacy arises in the following fashion. To the extent that knowledge of one's biological origin contributes to a sense of self, sealed record statutes deprive the adoptee of information that facilitates identity formation. One's identity plays a role in fundamental decision-making. The constitutional right to privacy protects fundamental decision-making from governmental intrusion. Because fundamental decision-making is intimately related to one's identity, the adoptee perforce makes such decisions based upon a sense of self truncated by legislatively mandated confidentiality. In a process that builds upon itself, these decisions influence subsequent evolution of the sense of self, which in turn plays a role in any further decision-making.

The Supreme Court has held that the right to privacy is a fundamental right.⁶⁹ Open access proponents maintain that legislation abridging fundamental rights must be narrowly drawn and promote a compelling state interest in order to pass constitutional

66. Justice Douglas stated the objectives of the constitutional right to privacy to be "the autonomous control over the development and expression of one's intellect, interests, tastes, and personality" and "freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children." *Doe v. Bolton*, 410 U.S. 179, 211 (1973) (Douglas, J., concurring). This statement by Douglas is consonant with the asserted close connection between one's state of personal development and fundamental decision making.

One commentator states that because "it is difficult even theoretically to separate a person's identity from his choices in fundamental relationships . . . interference with its development necessarily affects his private decisions." Note, *The Adult Adoptee's Constitutional Right to Know His Origins*, 48 S. CAL. L. REV. 1196, 1208 (1975).

67. Justice Stewart viewed the right to privacy to proscribe governmental intrusion into "matters so fundamentally affecting a person as the decision to bear or beget a child." *Roe v. Wade*, 410 U.S. 113, 169-70 (1973) (Stewart, J., concurring) (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

68. 381 U.S. 479 (1965).

69. *Roe v. Wade*, 410 U.S. 113, 155 (1973).

muster.⁷⁰ The proponents agree that until the adoptee achieves the age of majority, the state does have a compelling interest in protecting the adoptive parent from his adopted child's return to the birthparents and in preserving the birthparents' anonymity.⁷¹ Once the adoptee is past the age of majority, however, they maintain the compelling interest wanes.⁷² The thesis that the state's interest may fluctuate over time was employed by the Court in *Roe v. Wade*,⁷³ in which it held that the state's interest in a fetus becomes compelling after the first trimester of pregnancy.⁷⁴ Open access proponents argue, by reverse analogy, that once the adoptee reaches majority the state's interest ceases to be compelling.⁷⁵

Adoptees view the penumbral right to privacy as closely associated with the fourteenth amendment's guarantee of due process. They note the language employed by Justice Rehnquist in *Paul v. Davis*⁷⁶ characterizing the Court's right to privacy cases as "defying categorical description, [but] deal[ing] generally with substantive aspects of the Fourteenth Amendment . . . matters relating to . . . family relationships and child rearing. . . . In these areas it has been held that there are limitations on the States' power to substantively regulate conduct."⁷⁷

The asserted fundamental right to develop a "sense of self," discussed above as being closely allied to the right of privacy, is also viewed by adoptees as mandated by the fourteenth amendment. Adoptees note that "'sense of self' has been rightly characterized as a fourteenth amendment right by Justice Marshall concurring in *Castaneda v. Partida*."⁷⁸ Consequently, adoptees have asserted a limitation upon state action infringing upon substantive rights encompassed within the concept of "liberty" in the fourteenth amendment.⁷⁹ Professor Cyril Means argues that if the fourteenth amendment guarantee of "liberty" requires the voiding of a state zoning ordinance, the effect of which was to forbid a grandmother from living with one of her grandchildren,⁸⁰ then, a fortiori, sealed

70. See *Sherbert v. Verner*, 374 U.S. 398, 406 (1963), which articulates the compelling interest test.

71. Reply Brief For Appellants at 26, *ALMA Soc'y, Inc. v. Mellon*, 459 F. Supp. 912 (S.D.N.Y. 1978).

72. *Id.* at 26-27.

73. 410 U.S. 113 (1973).

74. *Id.* at 163-64.

75. Reply Brief For Appellants at 21, *ALMA Soc'y, Inc. v. Mellon*, 459 F. Supp. 912 (S.D.N.Y. 1978).

76. 424 U.S. 693 (1976).

77. *Id.* at 713.

78. Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions to Dismiss at 82, *ALMA Soc'y, Inc. v. Mellon*, 459 F. Supp. 912 (S.D.N.Y. 1978).

79. *Id.* at 81.

80. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

record statutes should be voided when they forbid a grandchild to know who his grandmother is.⁸¹ While representing a group of adoptees seeking access to the records of their adoption proceedings, he distinguished the constitutional rights of the adoptee, stemming from a blood relationship to those whose identity he seeks, from the purely contractual and statutory rights of foster parents.⁸² Birthparents would occupy the same status as adoptees, because they too have rights stemming from a blood relationship, but they voluntarily divest themselves of such rights when they place the child for adoption.⁸³ The adoptee, although affected by the state-sanctioned adoption process, is not a consensual party thereto and realistically cannot be held to have relinquished any rights.⁸⁴

B. Equal Protection Considerations

The equal protection argument is based upon the contention that adoptees constitute a group of persons who are unconstitutionally denied the right of access to their birth information solely because of their status as adoptees. "They alone cannot inspect their original birth certificates."⁸⁵ It is asserted that sealed record statutes bear no substantial relation to the object of their legislation (*i.e.*, the promotion of the welfare of the adoptee) "because of the identity crisis and psychological deprivation"⁸⁶ they occasion in many adoptees. Sealed record statutes induce an impermissible identity deficiency. Furthermore, it is argued that laws employing a classification based upon the status of being an adoptee (as do sealed record statutes) should be subject to the same level of scrutiny as laws employing classifications based upon the status of illegitimacy, because the two classes are substantially identical. "A classification based on one's status at birth, such as legitimate — illegitimate or acknowledged illegitimate — unacknowledged illegitimate, is analogous to a classification based upon one's status as an adoptee."⁸⁷ Because illegitimacy is viewed as "similar to a suspect criterion (an immutable characteristic determined solely by birth),"⁸⁸ it has been called a "quasi suspect" category requiring an

81. Plaintiffs' Memorandum of Law In Opposition to Defendants' Motions to Dismiss at 106, *ALMA Soc'y, Inc. v. Mellon*, 459 F. Supp. 912 (S.D.N.Y. 1978).

82. *Id.* at 87.

83. *Id.*

84. *Id.*

85. Klibanoff, *Genealogical Information in Adoption: The Adoptee's Quest and the Law*, 10 FAM. L. Q. 185, 190 (1977).

86. Scheppers, *Discovery Rights of the Adoptee — Privacy Rights of the Natural Parent, A Constitutional Dilemma*, 4 U. SAN FERN. V. L. REV. 65, 71 (1975).

87. Note, *The Adoptee's Right to Know His Natural Heritage*, 19 N.Y.L.F. 137, 145 (1973).

88. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

intermediate level of scrutiny.⁸⁹ The Supreme Court has defined the level of scrutiny accorded a classification based upon illegitimacy as "not a toothless one." Classifications based upon the status of adoptee should be accorded the same level of scrutiny.⁹⁰

It may even be contended that sealed record statutes, because they infringe upon a fundamental right — the right to develop a "sense of self" — should be strictly scrutinized. Under such a level of scrutiny statutes are struck down unless they promote a compelling state interest.⁹¹ It is claimed that sealed record statutes are not necessary to promote such an interest. While access advocates recognize that during an adoptee's minority there exists legitimate state concern for birthparents (to protect anonymity in order to facilitate adoption and avoid an adoption black market) and adoptive parents (to permit them to nurture the adoptee into adulthood without interference by birthparents), they nonetheless maintain that the problems giving rise to such concerns actually did not occur prior to the advent of the sealed record statutes, and thus the state possesses no compelling interest. Nor is there any evidence of such difficulties in open access jurisdictions.⁹² As stated, speculation that access will expand the black market is just that — speculation — and there is no compelling proof that any such increase would be more than minimal.⁹³ As to the birthparent's right to privacy and the state's interest in supporting it, it should be stressed that the evidence is mounting that many do not desire such privacy and in fact sincerely desire to ascertain the identity of their relinquished and now adult children.⁹⁴ While recognizing the position of those birthparents who do want privacy, access proponents argue that theirs is not the only position entitled to consideration. They maintain that the demonstrated legitimacy of their position must now be recognized.

C. Thirteenth Amendment Consideration

In *ALMA Society, Inc. v. Mellon*,⁹⁵ a federal class action suit, it was contended, *inter alia*, that the restrictive New York sealed records statutes violate the thirteenth amendment in that they impose one of the historic "badges and incidents" of African slavery

89. Plaintiffs' Memorandum of Law In Opposition to Defendants' Motions to Dismiss at 101, *ALMA Soc'y, Inc. v. Mellon*, 459 F. Supp. 912 (S.D.N.Y. 1978) (citing L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1082-92 (1978)).

90. *Mathews v. Lucas*, 427 U.S. 495, 510 (1976).

91. See note 70 *supra*.

92. Plaintiffs' Memorandum of Law In Opposition to Defendants' Motions to Dismiss at 117, *ALMA Soc'y, Inc. v. Mellon*, 459 F. Supp. 912 (S.D.N.Y. 1978).

93. *Id.*

94. See text accompanying notes 43-44 *supra*.

95. 459 F. Supp. 912 (S.D.N.Y. 1978).

upon the discrete, insular and politically powerless minority comprised of the two percent of the adult population who are adoptees.⁹⁶ One of the incidents of slavery was the practice of abrogating the parental relationship and depriving the offspring of African slaves of the care and attention of their parents. In the Congressional debates over the thirteenth amendment, Senator James Harlan of Iowa referred not only to minor children, but also said, "I ask whence the origin of the (master's) title to the services of the adult offspring of the slave mother."⁹⁷ The suit sought the invalidation not of the adoption system, but only its sealed records provisions regarding adult adoptees.

The crux of the thirteenth amendment argument is that when an adult adoptee is prevented from obtaining vital knowledge because other adults have the power to withhold their permission, he is forced to relinquish a portion of the attributes of a free person at the behest of others who rightfully should have no such power. The process of relinquishment and adoption have made the child a chattel property, to be conveyed first to the agency and then to the adopting parents, not just in childhood but for the duration of life. The adult human being who has been adopted is "reduced to a child standing before Big Daddy, the judge. Please Daddy, give me my name, Tell me who I am. Break the seal. Let me go free."⁹⁸

D. Primacy of Adoptees' Interests

Further arguments are marshalled by open access proponents to demonstrate that the adoptee's right to know more than offsets any countervailing right of the other parties to the adoption process. It has been pointed out that a birthparent's desire for anonymity may not be premised upon an interest in one's reputation.⁹⁹ Also, the state's interest in protecting birthparents' privacy does not rise to constitutional dimensions, because they do not own information as to birth identity exclusively, but rather as co-owners with the adult adoptee.¹⁰⁰ The birthparents' privacy interest is further attenuated by the fact that many of their number desire a reunion.¹⁰¹ Furthermore, as an alternative to sealed record statutes, those birthparents who do not desire a reunion have the option to seek tort

96. *Id.* at 916.

97. Speech by Senator Harlan, CONG. GLOBE 38th Cong., 1st Sess. 1439 (1864).

98. B. LIFTON, TWICE BORN 238 (1975). See also *Recognizing the Needs of Adopted Persons: A Proposal to Amend the Illinois Adoption Act*, 6 LOY. CHI. L.J. 49, 60-61 (1975).

99. *Cf. Paul v. Davis*, 424 U.S. 693, 712 (1976) (an interest in one's reputation stems from state law and is not mandated by the Due Process Clause of the United States Constitution).

100. Note, *The Adult Adoptee's Constitutional Right to Know His Origins*, 48 S. CAL. L. REV. 1196, 1215 (1978).

101. See text accompanying notes 30 & 31 *supra*.

remedies by which they may be made whole for any tortious invasion of their privacy by the adult adoptee.¹⁰²

Additionally, the interest of the adoptive parent in secrecy, while strong during the minority of the adoptee, has decreased by the time the adoptee reaches majority. The relationship between the members of the adoptive family presumably has had sufficient time to achieve bonding adequate to withstand the stress occasioned by the adoptee's reunion with his birthparents.¹⁰³

IV. COURTS' TREATMENT OF CONSTITUTIONAL ARGUMENTS

Adoptees' increasingly strident claims of a right of access to the records of their adoption proceedings, in concert with empirical studies by health professionals documenting the importance of such access for adoptees' psychological welfare, have resulted in court challenges to sealed record statutes, most of which allege constitutional infirmities in the denial of access. Thus far, these constitutional challenges have been rebuffed.

In *Yesterday's Children v. Kennedy*,¹⁰⁴ the Seventh Circuit utilized the doctrine of abstention to avoid a decision on the merits of a constitutional attack upon Illinois statutes limiting adoptees' access to adoption records. Yet, in the rather sympathetically worded opinion, the court referred approvingly to the unreported state *nisi prius* decision,¹⁰⁵ which utilized a balancing approach. A "friend of the court" notifies adoptive and birthparents who then may show by a preponderance of the evidence that substantial harm would result if disclosure is made; otherwise access is granted. The court reasoned that the state statutes¹⁰⁶ were construed by the lower court in such a way that access was limited to cases where adoptees could show critical medical reasons or genetic problems and in certain circumstances if an adoptee had a "real and immediate" need to know. Nevertheless, inasmuch as the state reviewing court had not yet construed the non-access statutes, abstention was required because such a construction might alter materially the constitutional issue by further explicating the standards for unsealing.¹⁰⁷ The court

102. *Cf. Paul v. Davis*, 424 U.S. 693 697 (1976) (respondent whose reputation was allegedly damaged by the circulation of a flyer containing pictures of "active shoplifters" was free to bring an action for defamation in the state courts).

103. See text accompanying note 55 *supra*.

104. 569 F.2d 431 (7th Cir. 1977).

105. *Id.* at 433 (citing *In re Daniel Doe*, 76 Co. 2436 (Cir. Ct. Cook Co., Co. Div., Co. Dept., Nov. 22, 1977)).

106. ILL. REV. STAT., ch. 4, § 9.1-18 (1975); *Id.* ch. 111½, §§ 73-17(2)(a), 73-17(4).

107. *Yesterday's Children v. Kennedy*, 569 F.2d 431, 435 (7th Cir. 1977). *Cf. Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471 (1977) and *Bellotti v. Bair*, 428 U.S. 132 (1976).

termed the state court balancing process "persuasive,"¹⁰⁸ however, and approved by dictum such efforts to achieve an "equitable and just solution."¹⁰⁹

In *ALMA Society, Inc. v. Mellon*¹¹⁰ various constitutional arguments were dismissed without consideration of the merits of the adult adoptees' claim. The court opined that the right to privacy and the right to receive important information by adult adoptees was permissibly limited in accordance with "a valid state interest to balance conflicting rights of privacy and to protect the integrity of the adoption process which is likely to suffer if the assurances of secrecy are not present."¹¹¹ The *ALMA* court held that a state has more than a rational basis in controlling access — it has a compelling interest. Thus even if the adult adoptees had made out a case vis-a-vis access, the countervailing state interest would suffice as regards constitutionality. Countervailance was found in the expectation of confidentiality engendered in and statutory assurance of privacy accorded to adoptive and birthparents. The court reasoned that the sealed records statute was tempered by the "good cause" provision.¹¹² The court did not specifically deal with the contention that the good cause requirement was a badge or incident of thirteenth amendment slavery except to note the defense's contention that the good cause requirement had never been recognized as an incident of slavery and that the plaintiffs' slavery argument was frivolous.

The *ALMA* decision has been described as a "negative precedent" by James B. Boskey, Chairman of the American Bar Association Family Law Section's Adoption Committee, who noted the increasing attack upon the restrictive access laws and rules.¹¹³ Professor Sanford N. Katz, Vice-chairman of the American Bar Association Family Law Section, believes that the *ALMA* decision (pending appeal at this writing) will create increased litigation "from among the millions of . . . adults . . . who want to learn their identities."¹¹⁴

Several state decisions are more explicit than *ALMA*. In *Application of Maples*,¹¹⁵ the Supreme Court of Missouri rejected a first amendment challenge by construing the free-flow-of-ideas cases cited by the adoptees¹¹⁶ to proscribe the impermissible forbidding of

108. 569 F.2d at 435.

109. *Id.* at 434. *Cf. In re Anonymous*, 89 Misc. 2d 132, 390 N.Y.S. 2d 779 (1976) (birthparents held to be necessary parties in an access case via a person in the capacity of a guardian *ad litem*).

110. 459 F. Supp. 912 (S.D.N.Y. 1978).

111. *Id.* at 917.

112. *Id.* at 916.

113. *The National Law Journal*, Nov. 20, 1978 at 2, col. 3.

114. *Id.*

115. 563 S.W.2d 760 (Mo. 1978).

116. *Stanley v. Georgia*, 394 U.S. 557 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

the free flow of ideas from one person to another, but not the mere restriction of the flow of information which is the product of the judicial process of adoption. The *Maples* court found such restrictions constitutional, holding that the state has a valid interest in balancing conflicting rights of privacy and in protecting the integrity of the adoption process, which the court felt would suffer if confidentiality were diminished.¹¹⁷ The plaintiff's liberty and privacy were unavailing because there existed in adoptive and birthparents a countervailing expectation of privacy, which, it was observed, would be frustrated by allowing access.¹¹⁸ As to equal protection, the court found no invidious discrimination in the constitutional sense. On the contrary, it reasoned that at birth the to-be-adopted child has a status no different from that of other children in that the birthparents of all children have a legal duty to support their children. Thus, the court rejected the argument that the status of adoptees constitutes "suspect criteria."¹¹⁹ It further found no invidious discrimination between adoptive and non-adoptive children, reasoning that the adoption process was beneficial to the adoptee.¹²⁰

The pater familias approach of the Missouri court is roughly parallel to that taken by a *nisi prius* New Jersey court in *Mills v. Atlantic City Dep't of Vital Statistics*.¹²¹ *Mills* is further important because the *ALMA* decision states that its views would be recognized as "almost in *haec verba* as the views expressed"¹²² in *Mills*. While acknowledging the constitutional right to privacy of *Griswold v. Connecticut*¹²³ and *Roe v. Wade*,¹²⁴ the *Mills* court held that only personal rights deemed "fundamental" or "implicit" are included, and that in order to be fundamental, the right asserted must be explicitly or implicitly guaranteed by the Constitution.¹²⁵ Even in areas of privacy in marriage and procreation, the right is not absolute.¹²⁶ The *Mills* court found "heritage" information not to be so intimately personal as to fall within the zones of privacy implicitly protected in the penumbra of the Bill of Rights (*viz.*: the first, fourth, fifth and ninth amendments).¹²⁷ Asserting that the

117. *In re Maples*, 563 S.W.2d 760, 762 (Mo. 1978).

118. *Id.* at 763-64.

119. *Id.* at 764.

120. *Id.* at 765.

121. 148 N.J. Super. 302, 372 A.2d 646 (1977).

122. *ALMA Soc'y, Inc. v. Mellon*, 459 F. Supp. 912, 917 (S.D.N.Y. 1978).

123. 381 U.S. 479 (1965).

124. 410 U.S. 113 (1973).

125. *Mills v. Atlantic City Dep't of Statistics*, 148 N.J. Super. 302, 372 A.2d 646, 650 (1977). See *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

126. See *Doe v. Commonwealth's Att'y*, 425 U.S. 985 (1976) (private homosexual behavior punishable under state sodomy law).

127. *Mills v. Atlantic City Dep't of Statistics*, 148 N.J. Super. 302, 309-10, 372 A.2d 646, 650 (1977).

right to privacy may be regulated if a state's interest is compelling, and finding no fundamental interest of adoptees involved, the court found the non-access statute reasonable as bearing a rational relationship to a permissible state objective. The *Mills* court stressed the right to privacy of the birthparents, construing *Stanley v. Georgia*¹²⁸ differently than the adoptees,¹²⁹ and emphasized that no constitutional or personal right was absolute. It found the good cause requirement a valid mechanism to balance conflicting rights and to protect the adoption process.¹³⁰ As to equal protection, the *Mills* court did not find that the status of adoptees satisfied the constitutional requirements for a suspect classification.

V. THE "GOOD CAUSE" REQUIREMENT

Judicial intransigence in the face of these constitutional challenges does not entirely foreclose the adoptee from legal recourse; rather, to gain access to the records an adoptee must make a showing of such need as will satisfy statutory requirements. The standard against which this need is measured, if not always clearly articulated, frequently has been construed to be "good cause."¹³¹ There is, however, a measure of unanimity that "bald curiosity" alone is not so exigent a circumstance as to warrant unsealing the records.¹³² A review of several courts' holdings in actions by adoptees seeking access to the records of their adoption proceedings defines by way of illustration the showing courts require in order to satisfy the "good cause" standard.

In *In re Daniel Doe*¹³³ an adult adoptee presented psychiatric evidence to a Cook County judge that much of his emotional distress and insecurity would be alleviated if his adoption records were released. Although finding that the adoptee had made a prima facie showing by a preponderance of the evidence that he, as an adult, had a real and immediate need for access to the adoption records, the court also found that the adoptive and birthparents had an interest and that due process required that they receive notice and opportunity to be heard. Absent a showing by the adoptive or birthparents that they would suffer substantial harm, the records would, however, be released. The court also held that should the search for the adoptive and birthparents prove unavailing, the relief would be granted.

128. 394 U.S. 557 (1969).

129. *Mills v. Atlantic City Dep't of Statistics*, 148 N.J. Super. 302, 311-14, 372 A.2d 646, 652 (1977).

130. *Id.*

131. See text accompanying note 8 *supra*.

132. *In re Anonymous*, 4 FAM. L. REP. (BNA) 2105 (N.Y. Surr. Ct., Queens Co., Nov. 25, 1977).

133. 76 Co. 2436 (Cir. Ct. Cook Co., Co. Div., Co. Dept., Nov. 22, 1977).

In *In re Maxtone-Graham*,¹³⁴ the same court required, as a condition precedent to ruling upon the request of the petitioner that the identity of her birthmother be revealed, that the birthmother be located, and that an effort be made to secure her consent. Her consent was in fact given and the files were unsealed. The names of foster parents who had cared for the adoptee prior to adoption, however, were withheld. The court held further that the foster parents' need for confidentiality outweighed the adoptee's needs because they had had no contact with the adoptee for over 30 years.¹³⁵

In *Mills v. Atlantic City Dep't of Vital Statistics*,¹³⁶ the court weighed the interest of the adoptee against that of the birthparents and held that because the adoptee's interest was based upon more than mere curiosity, the records should be unsealed.¹³⁷

A Missouri appellate court similarly employed an approach "weighing" the respective interests of the parties to the adoption process.¹³⁸ It required the adoptee to show cause, and if the showing was sufficient, so much information as was adjudged necessary would be disclosed. Information as to the identity and whereabouts of the parties to the triangle would be released only under compelling circumstances, however, and the judge sought to obtain the parties' consent if possible. The court held that "great deference" should be given to the interests of the other parties to the adoption triangle should their consent not be obtained.¹³⁹

In Washington, D.C., an appellate court remanded an access case because the trial court, without a hearing, had denied a petition for leave to inspect adoption records. The appellate court noted that "it is a matter of common knowledge that due to studies and experiences in the recent decade there is an increasing well of support for opening court files to adoptees so as to aid in their searches for their natural parents."¹⁴⁰ The case was remanded for an evidentiary hearing. On remand, the lower court permitted access after the hearing¹⁴¹ "based solely on the merits of this particular request."¹⁴² The court noted the "petitioner's needs and her ability to cope with the ramification of disclosure, supplemented by the affirmative, tender and supportive positions of her husband and adoptive parents."¹⁴³

134. 90 Misc. 2d 107, 393 N.Y.S.2d 835 (Surr. Ct., N.Y. Co. 1975).

135. *Id.* at 110, 393 N.Y.S.2d at 837.

136. 148 N.J. Super. 302, 372 A.2d 646 (1977).

137. *Id.* at 318-20, 372 A.2d at 655.

138. *In re Maples*, 563 S.W.2d 760 (Mo. 1978).

139. *Id.* at 766.

140. *In re Adoption of Female Infant*, No. A 449-59 (Sup. Ct. D.C., Jan. 31, 1979).

141. *Id.*

142. *Id.*

143. *Id.*

VI. CONCLUSION

In light of the growing body of evidence that deprivation of origin information promotes severe psychological dysfunction among adoptees, should not sealed record statutes accordingly be modified to reflect the needs of those whose welfare is purportedly the primary concern of the adoption process? Several recommendations regarding such modification, while ameliorating the adoptee's plight, also protect the interests of the other parties to the adoption process. First, if the records of the adoption proceedings are made available to the adoptee as of right only upon his reaching majority, sufficient time will be allowed for the bond between adoptee and adoptive parents to be reinforced sufficiently to withstand a threat of the alienation of the affections of the adoptee occasioned by a reconciliation with the birthparents. Such an approach is consonant with the view expressed by Dr. A. D. Sorosky, a well-known psychiatrist in the field of adoption, that "it is important for the adoptive parents to realize that they are the true psychological parents. The birthparent is someone else — a link to the past in terms of that person's identity. It is identity the adoptee seeks, not another set of parents."¹⁴⁴ This approach also coincides with the opinion of Dr. James Harris, Interim Director of the Children's Medical and Surgical Center (Division of Psychiatry) at The Johns Hopkins Hospital, that it is "advisable that adult adoptees be given the right to see records of their biological origin."¹⁴⁵

Second, if such a modified statute granting access only upon maturity were to apply only prospectively, birthparents who placed their child for adoption with the expectation of anonymity would not have that expectation frustrated. Subsequent to the modification of the statute, parents considering placing their child for adoption would be forewarned of the child's legal right to learn their identity upon reaching maturity. An infirmity in the prospective approach lies in the fact that it grants adoptees differing rights depending upon the fortuitous factor of date of adoption. Those "placed" before the modification would have rights inferior to those placed subsequently. Such a system of classification might run afoul of the equal protection clause of the federal constitution.

Creation of a mediation board, to function either in place of a modification of the statute or in addition thereto, is an alternative proposed in certain quarters. Composed of persons professionally trained in the field of adoption, such a board would, if it considered such action appropriate, provide assistance and counseling in effecting a reunion after contacting the interested parties. The

144. Lilliston, *Social Workers Discuss Adoptee's Plight*, L.A. Times, Apr. 15, 1974, Sec. 4 (View) at 13, col. 2 (quoting Dr. Sorosky).

145. Letter to the author from Dr. Harris, dated July 10, 1978.

primary consideration in making a determination as to the appropriateness of a reunion under this approach would be whether the other parties to the triad would accede to it. Adoptees view the concept of a mediation board with disfavor, contending that they have an unconditional right to possess origin information upon reaching majority.¹⁴⁶

As it now stands, the adoption process disproportionately burdens the adult adoptee. The law's purpose in secreting adoption records is said to be the protection of the birthmother, the adoptee and the adoptive parents from unwanted confrontation. Has not this paternalism, however, produced an unforeseen and unwarranted result? Although it might be traumatic for the birthmother to be confronted by her now-grown child, should solicitude for her feelings preempt the rights of that adult human being who seeks to know his nascence? Similarly, the desire of the adoptive parents to avoid the possibility that after the reunion the birthparents might compete for the affection of their adult child should not operate inexorably to frustrate the identity search of the grown-up. Dr. Henry Kempe, a preeminent authority in child abuse, observed: "In a free society the newborn child does not belong to the state nor to his parents, but to himself in care of his parents."¹⁴⁷ Even more surely, the mature adoptee belongs to himself, and he should not be deprived of that most integral component of his selfhood — his identity.

Adoption is a worthwhile and necessary societal mechanism. Yet, let us not lose sight of the fact that it is a human mechanism — one operated by humans who find themselves occupying the role of social worker, legislator, and judge. The beneficent purpose of adoption must not obscure the fact that as practiced it has produced inequities. Such imbalance was not foreseen originally by the experts in the adoption movement. They assumed that the transposition of the adoptive in place of the original birth certificate was equivalent to supplanting the birthparents entirely by the adoptive parents. This laudable theory was then extended to obliterate completely all legal vestiges of the adoptee's true life source. The paradox is that this theory creates an injustice for the professed primary beneficiaries of the adoption process.

146. A relatively new and specialized technique, utilizing an adult adoptee rather than a social worker as an intermediary to approach birthparents with their offspring's request for a reunion, is tolerated by some adoptees, because they feel that social workers might present such a request in such an unsympathetic or casual way as to chill what would otherwise be an altogether manageable joinder. It should be observed, however, that most adult adoptees view the intermediary approach as at best an inequitable compromise, as they feel their fundamental rights are being denied when any barrier is erected between them and the information they seek.

147. Kempe, *Approaches to Preventing Child Abuse — The Health Visitors Concept*, 130 AM. J. DISEASES OF THE CHILD 941, 947 (1976). Permission to use this quotation granted by the author.

Society, therefore, must seek to adjust the adoption device so as to ameliorate this unforeseen but undeniable injustice. This will be an enormously difficult task, requiring immense thoughtfulness and understanding in view of the primal emotionalism of the subject matter. Each party to the dialogue is entitled to be heard, and anger should not be directed against those who voice legitimate complaint. The participants in the adoption process are linked inextricably into a triangle. Why should this triangle not be equilateral — and not isosceles, scalene or obtuse? Particularly . . . obtuse.